Tiffany (NJ) Inc. et al v. eBay Inc. Doc. 11

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY, Plaintiffs, -against- eBAY INC., Defendant.	BUCHWALD 04 Civ. 4607 (NRB) ECF Case

STIPULATION AND ORDER FOR THE PROTECTION
AND EXCHANGE OF CONFIDENTIAL INFORMATION

WHEREAS, the parties to the above-captioned litigation are each in the possession of confidential and highly confidential information and such information is being sought in discovery;

WHEREAS, the parties agree that the production of information by each of them should take place subject to the provisions of a confidentiality stipulation;

WHEREAS, the parties maintain policies of recognizing and protecting their valuable proprietary information; and

WHEREAS, the parties have reached agreement on the terms of this Stipulation and Order for the Protection and Exchange of Confidential Information ("Stipulation and Order") pursuant to Fed. R. Civ. P. 26(c);

IT IS HEREBY STIPULATED AND AGREED that the following Stipulation and Order shall govern the handling of all confidential information in the above-captioned case.

1. Scope, Applicability and Definitions. The provisions of this Stipulation and Order shall apply to the parties to this action, their counsel of record, and any non-party or third party

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who agrees to be bound by the terms of this Stipulation and Order. To the extent either the plaintiffs or the defendant produce documents or information during discovery that contain trade secrets or other confidential and proprietary business information that is not publicly available, such documents or information shall be clearly designated as "Confidential" at the time production occurs ("Confidential Material"). As a general guideline, information designated "Confidential" shall be those things that include information that is used by the producing party in, or pertaining to, its business, which has not been made public and which the producing party would not normally reveal to third parties or, if so revealed, would require such third parties to maintain in confidence. If a party reasonably believes that the particular material to be produced or disclosed is of such a highly sensitive nature that its disclosure should be limited only to those persons described in paragraph 2 below, that party shall stamp on or otherwise permanently affix to such material the designation "Highly Confidential" ("Highly Confidential Material"). As a general guideline, information designated "Highly Confidential" shall include the following: highly sensitive sales, distribution, and financial information (including financial information of third parties) and information of a sensitive competitive nature, such as marketing information, forecasting information, or business expansion information. It is understood that the "Highly Confidential" designation is an exceptional designation and is to be used in good faith only to protect highly sensitive confidential information. If a party reasonably believes that the particular material to be produced or disclosed is of an extremely sensitive nature – *i.e.* information relating to fraud prevention methods and personal information relating to defendant's users, such as passwords, that party shall stamp on or otherwise permanently affix to such material the designation "Restricted" ("Restricted Material"). The party receiving the Restricted Material shall maintain such Restricted Material in a locked room or a locked storage facility in the offices of the outside counsel of the party receiving the Restricted Material and such Restricted Material may not be kept in the general files, computer or otherwise, of the firm. The receiving party's outside counsel of record and experts shall maintain and store any notes concerning Restricted Material in a similarly secure manner that prevents duplication of or unauthorized access to Restricted Material. It is understood that the "Restricted" designation is an exceptional designation and is to be used in good faith only to protect extremely sensitive confidential information, and the parties agree not to use the designation "Restricted" for the purposes of unnecessarily restricting the receiving party's access to information concerning the lawsuit.

Confidential Material, Highly Confidential Material and Restricted Material shall not be used by anyone other than the party receiving such Confidential Material, Highly Confidential Material or Restricted Material or for any purpose other than the preparation for, trial of, and conduct of other proceedings in this litigation, except as otherwise agreed to in writing by the parties or ordered by the Court. This Stipulation and Order shall not govern the use or disposition of materials or information that is in the public domain or is legally obtained outside of the discovery or trial process. Documents and information designated as Confidential, Highly Confidential or Restricted shall include (a) all copies, extracts and complete or partial summaries prepared from such documents or information; (b) portions of deposition transcripts and exhibits thereto which contain or reflect the content of any such documents, copies, extracts, or summaries; (c) portions of briefs, memoranda or any other writing filed with the Court and exhibits thereto which contain or reflect the content of any such documents, copies, extracts, or summaries; and (d) testimony taken at a hearing or other proceeding that is addressed consistent with paragraph 7 hereto.

2. Distribution. Except with the prior written consent of the party producing the Restricted Material at issue, or upon further order of this Court after notice to all affected parties, Restricted Material or information derived therefrom or referring thereto shall not be disclosed, disseminated or otherwise distributed to any person except: (a) the individuals employed by counsel of record for the parties to this litigation and the in-house legal department who are identified on the schedule attached hereto as Exhibit B; (b) any consultants or experts retained or consulted by counsel for the prosecution or defense of this litigation who are identified on the schedule attached hereto as Exhibit B hereto, provided that such consultant or expert is provided with and signs a copy of the Confidentiality Agreement attached hereto as Exhibit A; (c) any actual deponent or witness in this litigation who is currently employed by the party that produced the specific documents or material to be shown; (d) any authors or identified original recipients of the designated documents; (e) any actual deponent or witness in this litigation who was formerly employed by the party that produced the specific documents or material to be shown, provided that the counsel of record for the party that produced the documents is present at the showing of the documents and material and is alerted in writing no less than ten (10) days in advance of such proposed disclosure that the documents or material will be shown so counsel has the opportunity to seek redress from the Court preventing the showing of the documents or material, and provided that the documents or materials to be shown were created prior to the date of termination of that employee; (f) court reporters, videographers, and stenographers at depositions or court proceedings at which Restricted Material is disclosed; and (g) the Court and court personnel, if filed pursuant to paragraph 4 below.

Except with the prior written consent of the party producing the Highly Confidential Material at issue, or upon further order of this Court after notice to all affected parties, Highly

Confidential Material, or information derived therefrom or referring thereto shall not be disclosed, disseminated or otherwise distributed to any person except: (a) counsel of record and in-house counsel for the respective parties to this litigation; (b) persons employed by counsel for the parties to assist such counsel in connection with this litigation; (c) consultants or experts retained or consulted by counsel for the prosecution or defense of this litigation, provided that such consultant or expert is provided with and signs a copy of the Confidentiality Agreement attached hereto as Exhibit A; (d) any actual deponent or witness in this litigation who is currently employed by the party that produced the specific documents or material to be shown; (e) any authors or identified original recipients of the designated documents; (f) any actual deponent or witness in this litigation who was formerly employed by the party that produced the specific documents or material to be shown, provided that the counsel of record for the party that produced the documents is present at the showing of the documents or material and is alerted in writing no less than ten (10) days in advance of such proposed disclosure that the documents or material will be shown so counsel has the opportunity to seek redress from the Court preventing the showing of the documents or material, and provided that the documents or materials to be shown were created prior to the date of termination of that employee; (g) court reporters, videographers, and stenographers at depositions or court proceedings at which Highly Confidential Material is disclosed; and (f) the Court and court personnel, if filed pursuant to paragraph 4 below.

Except with the prior written consent of the party producing the Confidential Material at issue, or upon further order of this Court after notice to all affected parties, Confidential Material or information derived therefrom or referring thereto shall not be disclosed to any person except: (a) counsel of record and in-house counsel for the respective parties to this litigation; (b) persons employed by counsel for the parties to assist such counsel in connection with this litigation; (c) consultants or experts retained or consulted by counsel for the prosecution or defense of this litigation, provided that such consultant or expert is provided with and signs a copy of the Confidentiality Agreement attached hereto as Exhibit A; (d) any actual deponent or witness in this litigation who is currently employed by the party that produced the specific documents or material to be shown; (e) any authors or identified original recipients of the designated documents; (f) any actual deponent or witness in this litigation who was formerly employed by the party that produced the specific documents or material to be shown, provided that the counsel of record for the party that produced the documents is present at the showing of the documents or material and is alerted in writing no less than ten (10) days in advance of such proposed disclosure that the documents or material will be shown so counsel has the opportunity to seek redress from the Court preventing the showing of the documents or material, and provided that the documents or materials to be shown were created prior to the date of termination of that employee; (g) court reporters, videographers, and stenographers at depositions or court proceedings at which Confidential Material is disclosed; (h) the Court and court personnel, if filed pursuant to paragraph 4 below; and (i) officers and current senior management of the parties whose knowledge of such information is necessary to enable the parties to prepare for trial, to try this action, or to engage in appellate proceedings herein.

Except upon further order of the Court, no person receiving Confidential Material, Highly Confidential Material or Restricted Material shall disclose, disseminate or otherwise distribute any portion of the contents thereof to any person other than those described in this paragraph and for the purposes specified in paragraph 1 above.

3. Written Acknowledgments. Each consultant or expert retained or consulted by counsel for the prosecution or defense of this litigation as referred to in paragraph 2 above to whom Confidential Material, Highly Confidential Material or Restricted Material is to be given, shown, made available, or communicated in any way shall agree in writing to be bound by the terms of this Stipulation and Order by executing a copy of the Confidentiality Agreement attached hereto as Exhibit A before that person is exposed to said Confidential Material, Highly Confidential Material or Restricted Material. The attorneys for the parties shall maintain a file of such written agreements.

4. Filing Under Seal. Anyone filing Confidential Material, Highly Confidential Material or Restricted Material with the Court (including but not limited to filing in connection with any motion, hearing or trial) shall file such papers directly with the Court by enclosing them in an envelope or container on the face of which shall be typed or stamped:

CONFIDENTIAL

> This document is filed under seal and unless otherwise ordered by the United States District Court, Southern District of New York, shall not be reproduced for, or shown to persons other than counsel of record engaged in Tiffany (NJ) Inc. et al. v. eBay Inc., 04 Civ. 4607 (NRB).

To the extent possible, only confidential portions of filings with the Court shall be made under seal. Any inadvertently filed Confidential Material or inadvertently filed Highly Confidential Material or inadvertently filed Restricted Material shall (at the request of the party who so designated the information) be removed from the public court files and delivered to Chambers, pending further determination of the Court.

5. Deposition Procedures. During the course of depositions taken in this action, counsel shall be permitted to designate portions of the transcript that contain Confidential

Material, Highly Confidential Material or Restricted Material subject to this Stipulation and Order as "Confidential," "Highly Confidential" or "Restricted." In addition, all transcripts of depositions taken in connection with this action shall be deemed "Highly Confidential" in their entireties for ten (10) business days after such transcripts are received by counsel for the witness who was deposed. Before the expiration of such ten-business-day period, counsel for the witness shall designate such portions of the deposition transcript, if any, that are deemed to contain Confidential Material, Highly Confidential Material or Restricted Material as "Confidential," "Highly Confidential" or "Restricted." Following the expiration of such ten-business-day period, unless such period is extended by the written mutual consent of the parties hereto, all portions of the deposition transcript that have not been designated as containing Confidential Material, Highly Confidential Material or Restricted Material, either at the deposition itself or in writing afterward, shall be deemed to be outside the scope of this Stipulation and Order.

6. Reserved Arguments. This Stipulation and Order and the parties' submissions relating thereto shall not operate as an admission or determination that any document or information is or is not:

(a) discoverable, or

(b) admissible as evidence.

7. Procedures at Trial. With respect to testimony elicited during hearings and other proceedings, whenever counsel for any party deems that any question or line of questioning calls for the disclosure of Confidential Material, Highly Confidential Material or Restricted Material, counsel may designate on the record prior to such disclosure that the disclosure is "Confidential," "Highly Confidential," or "Restricted." Whenever Confidential Material, Highly Confidential Material or Restricted Material is to be discussed in a hearing or other proceeding,

any party claiming such confidentiality may request that the Court exclude from the room any person who is not entitled under this Stipulation and Order to receive Confidential Material, Highly Confidential Material or Restricted Material.

8. Subpoenas from Non-Parties. In the event any of the persons bound by this Stipulation and Order is served with or receives subpoenas or written demands calling for production of documents or testimony relating to any Confidential Material, Highly Confidential Material or Restricted Material obtained from a party hereto, including any federal or state agency or authority, prior to responding thereto the person receiving any such subpoena or demand shall promptly serve notice of receipt of same on counsel for the party that produced the Confidential Material, Highly Confidential Material or Restricted Material at issue. The producing party shall have fifteen (15) days following such service (or such shorter period of time as may be necessitated by the terms of the subpoena or demand) to move the Court for a ruling respecting the necessity of compliance therewith. Unless ordered by the Court, the party receiving a subpoena or demand shall not respond thereto until the producing party has had an opportunity to seek a ruling from the Court.

9. Conclusion of Litigation: Procedure and Effect. At the conclusion of the above-entitled action, including all appeals, any and all originals or reproductions of any Confidential Material, Highly Confidential Material or Restricted Material subject to this Stipulation and Order (with the exception of deposition transcripts, deposition exhibits or documents filed with the Court, provided that the file in which such materials are retained contains an indication that such file includes Confidential Material, Highly Confidential Material or Restricted Material, and that access to the same is restricted pursuant to the Stipulation and Order) shall be returned to the producing party, or shall be destroyed by counsel, as requested by the producing party.

The provisions of this Stipulation and Order, insofar as they restrict the communication and use of Confidential Material, Highly Confidential Material or Restricted Material produced hereunder shall, except upon prior written permission of the parties or further order of the Court, continue to be binding after the conclusion of this action, and the Court shall retain jurisdiction over the parties (and any participating non-party) for the purpose of enforcing or modifying the provisions of this Stipulation and Order after the termination of this action.

10. Objections to Designations. If at any time a party objects to the designation of documents or information as "Confidential" or "Highly Confidential" or "Restricted" under this Stipulation and Order, the objecting party shall notify the designating party in writing. The notice shall identify the documents or information in question, and shall specify in reasonable detail the reason for the objection to the designation. The parties shall endeavor to resolve any such objections informally. If no resolution is achieved, the party objecting to the designation may move the Court pursuant to Fed. R. Civ. P. 26(c) for a ruling on the confidentiality of the documents or information in question. The party seeking to justify the use of the "Confidential" or "Highly Confidential" or "Restricted" designation bears the burden of proof on any such motion. Pending determination of such motion, any information previously designated as Confidential, Highly Confidential or Restricted shall continue to be treated as Confidential, Highly Confidential or Restricted.

11. Inadvertent Production. The inadvertent production of any document or other information during discovery in this action shall not be deemed to waive a party's claim as to its confidential nature, or preclude any party from subsequently designating such information as Confidential, Highly Confidential or Restricted Material. Disclosure of such information by any party receiving such information prior to its designation as Confidential, Highly Confidential or

Restricted Material shall not constitute a violation of this Stipulation and Order. However, upon receiving such designation of Confidential, Highly Confidential or Restricted Material, a party shall subsequently treat it as Confidential, Highly Confidential or Restricted Material, and shall use its best efforts to notify any person to whom such information has previously been disclosed that such information has been designated as Confidential, Highly Confidential or Restricted.

The inadvertent production of any document or other information during discovery in this action shall be without prejudice to any claim that such material is privileged under the attorney-client or other privilege, or protected from discovery as work product. When a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, the party receiving the information must promptly return or destroy the specified information and any copies. If the information is destroyed, the party receiving the information shall provide written confirmation of destruction. The producing party must comply with Rule 26(b)(5)(A) of the Federal Rules of Civil Procedure with regard to the information and preserve it pending a ruling by the court.

12. Effective Date. Until this Stipulation and Order has been signed by the Court, it shall be effective as an agreement among the parties immediately upon its execution by counsel of record for all parties.

Dated: New York, New York
March 16, 2005

ARNOLD & PORTER LLP

By: ______________________
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WEIL, GOTSHAL & MANGES LLP

By: ______________________
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767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Attorneys for Defendant

SO ORDERED:

____
Naomi Reice Buchwald
United States District Judge
Dated: March 24, 2005

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY, Plaintiffs, -against- eBAY INC., Defendant.	04 Civ. 4607 (NRB) ECF Case

CONFIDENTIALITY AGREEMENT

I, ____________, do hereby certify that I have read the Stipulation and Order for the Protection and Exchange of Confidential Information dated __________, 2004, executed by the parties in Tiffany (NJ) Inc. et al. v. eBay Inc., 04 Civ. 4607 (NRB), now pending before the United States District Court for the Southern District of New York, because it is necessary for me in the performance of my duties to have access to "Confidential Material" and/or "Highly Confidential Material" and/or "Restricted Material" that is the subject of said Stipulation and Order. I agree not to disseminate or disclose any information subject to said Stipulation and Order that I review or about which I am told, to any person, entity, party or agency for any reason, except in accordance with the terms of the Stipulation and Order. I further agree to return all Confidential, Highly Confidential and Restricted Material to counsel at the conclusion of my involvement or engagement in the matter. I understand that I am personally bound by and subject to all of the terms and provisions of said Stipulation and Order. I subject myself to the jurisdiction of the United States District Court for the Southern District of New York for purposes of enforcement of this Stipulation and Order.

Witness my signature, this ____day of ________________, 200_.

Address:
Telephone Number:

Witness

EXHIBIT B

INDIVIDUALS WHO MAY HAVE ACCESS TO RESTRICTED DOCUMENTS

On behalf of Tiffany

Arnold & Porter LLP:
- James Swire
- Peter Haveles
- Dorothy Giobbe
- Erik Walsh
- Ross Schwarz

Tiffany (NJ) Inc. and Tiffany and Company:
- Tarz Palomba, Vice President, Legal
- Ewa Zalewska, Staff Attorney
- John Pollard, Director of Investigations

On behalf of eBay

Weil, Gotshal & Manges LLP:
- R. Bruce Rich
- Adam Cohen
- Jeffrey Osterman
- Randi Singer
- Mark Fiore
- Lori Goldstein
- Michael Hoernlein
- William Cruse
- Shirley Jean
- Jessica Rosen

eBay Inc.:
- Jay Monahan, Vice President, Intellectual Property & Litigation, Assistant Secretary
- Michael Richter, Associate General Counsel, Litigation
- Francine Lyle, Litigation Counsel